No. 14573

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ELI B. CASTLEMAN, MARION V. CASTLEMAN, LOUIS FEUERMAN, JULIUS NOVEMBER, ELEANOR NOVEMBER and BERNARD REICH,

Appellants,

vs.

HOWARD R. HUGHES, RKO PICTURES CORPORATION, RKO RADIO PICTURES, INC., THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, ELI B. CASTLEMAN, MARION V. CASTLEMAN and LOUIS FEUERMAN,

Appellees.

BRIEF OF APPELLEE RKO RADIO PICTURES, INC.

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BRIEF OF APPELLEE RKO RADIO PICTURES, INC.

Statement of Case

This "appeal" is from a final judgment of the District Court, Southern District of California, Central Division (Hon. BEN HARRISON, D. J.) in a stockholder's derivative action.[1] The judgment (a) dismissed the cause with prejudice and (b) denied to appellant Bernard Reich, Esq., counsel fees and costs (R. 360-61).

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[1] The action below was styled *Eli B. Castleman and Marion V. Castleman, doing business as Wolverine Textile Company, and Louis Feuerman,* Plaintiffs, against, *Howard R. Hughes, RKO Pictures Corporation, RKO Radio Pictures, Inc. and The Chase National Bank of the City of New York,* Defendants.

This appellee, RKO Radio Pictures, Inc. ("Radio" herein), contends that the dismissal was correct and that the refusal to assess any counsel fees against Radio was proper.

Designated as "appellants" are five stockholders of RKO Pictures Corporation ("RKO" herein, as distinguished from "Radio"). Three of these stockholders—the two Castlemans and Feuerman (herein collectively called "the Castlemans")—were plaintiffs below and, strangely enough, appear on the appellate docket also as appellees. The remaining two stockholders—the Novembers—were seeking leave to intervene at the time of judgment (R. 174-181; 351-2).

The sixth "appellant" is Bernard Reich, Esq., formerly attorney in California for the Castlemans (R. 152-8), who also presented the intervention motion on behalf of the Novembers (R. 174-181). Reich separately moved on his own behalf for counsel fees and costs both as against the defendants (R. 283 *et seq.*) and against the Castlemans (R. 263 *et seq.*).

Appellees in this Court are the Castlemans, plaintiffs below, and Radio. Jurisdiction over RKO and The Chase Bank was never attempted or secured below. Reich at one point did attempt to serve the individual defendant, Howard R. Hughes, by leaving a summons and amended complaint with a hotel clerk, a service which ultimately was quashed (R. 40, 131). Since the Court below did not have jurisdiction over these three defendants, they are not before this Court.

Radio, then a wholly owned subsidiary of RKO, was the only defendant before the Court at the time of dismissal. Its presence in the case was somewhat anomalous: no plaintiff owned stock in Radio and, of course, no relief was sought for or against it.

The Facts

In its major aspect, this case involves merely a controversy over attorney's fees between Reich, on the one hand, and his employer, Louis Kipnis, Esq. of New York, on the other.

This controversy stems from Reich's retention by Kipnis to represent the Castlemans—Kipnis' clients—in a derivative stockholders' action filed in California on behalf of RKO against Hughes. All claims of the Castlemans, the nominal plaintiffs for whom both Kipnis and Reich acted, went to judgment in another derivative action filed by them in Nevada, as the result of a compromise and settlement consummated in compliance with Rule 23(c) of the Nevada Rules of Civil Procedure, identical to Rule 23(c) of the Federal Rules of Civil Procedure (R. 41).[1]

The following major facts, stated here without characterization, are largely beyond reasonable controversy.

A. The Institution by the Castlemans of Successive Suits Against Hughes in New York, California and Nevada

In October, 1952 the Castlemans, represented by Louis Kipnis, and Leo Mittelman, Esq., both of New York, formally demanded of RKO that it institute suit against Howard R. Hughes, RKO's Board Chairman and principal stockholder, for (a) an accounting of profits allegedly

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[1] Paragraph (c) of Nevada's Rule 23 covering "Class Actions" reads in so far as pertinent as follows: "A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs . . ."

Derivative stockholder actions undeniably come within the purview of Rule 23(a)(1). See 3 Moore's Fed. Prac., § 23.08.

made by him in a sale of his stock interest in RKO and for (b) an accounting for alleged waste and mismanagement (R. 27-8). Shortly thereafter Kipnis instituted a stockholders' derivative action in the New York State courts and moved for appointment of a receiver of RKO (R. 100; 136-7). Hughes, concededly the principal defendant but a non-resident of New York, was never served and never appeared in the New York action (R. 153; 319).

On December 13, 1952, Kipnis, on the recommendation of a mutual friend, retained Reich on a contingent basis to institute a companion "stand-by" suit on the Castlemans' behalf in California (R. 153-4; 319-20). This action was filed in the District Court below on December 15, 1952, but no attempt was made to serve any defendant at that time.

A few days later Kipnis met with Hughes' attorney under the auspices of Floyd Odlum who, at Kipnis' request, had volunteered to act as an intermediary (R. 154-5; 320-1). At this meeting Kipnis learned that Mr. Hughes was in fact a resident of Nevada (R. 320).

On December 23, 1952—eight days after the filing of the California suit—a third Castleman action was started in the Eighth Judicial District Court of Nevada, Clark County, at Las Vegas (R. 184). Reich was not included in this action as one of the Castleman attorneys. The Nevada complaint was in all material respects identical with that in the California action except that, in addition to Hughes, the Hughes Tool Company and all directors of RKO were named as defendants (R. 187). Hughes, the other individual defendants and Hughes Tool Company answered. RKO and Radio thereafter also answered and the Nevada action thus came to issue as the only case over which personal jurisdiction had been or, in all likelihood, could be obtained over all the widely-scattered defendants (R. 239-240).

Having obtained jurisdiction over Hughes in Nevada, Kipnis withdrew the receivership application in the New York suit and eventually that action was voluntarily dismissed without further proceedings.

Meanwhile, in the Court below Reich was quiescent until March 4, 1953, when, after consultation with Kipnis, he filed an amended complaint. Thereafter he purported to effect service on Hughes by having the marshal leave a copy of the summons and amended complaint with the clerk of the Beverly Hills Hotel (R. 138). Radio was served with process and also with a notice to take Hughes' deposition.

Reich and Kipnis, his employer, are in dispute as to whether Reich was authorized to direct this service of process in what both had originally considered a "stand by" action (R. 142-3), a status even more appropriate now that the same charges were at issue in Nevada. In any event, the filing of the amended complaint constituted the last affirmative step admitted by both to have been taken by Reich in furtherance of the terms of his retainer by Kipnis. Certainly from the time of service on Radio and purported service on Hughes, Kipnis and Reich were at odds over the course of the California action. Without detailing the progress of this struggle (R. 140-7), we note that, on May 7, 1953, Kipnis took the final step of discharging Reich and asking that he consent to a substitution of counsel (R. 157).

During a lull in his battle with New York counsel, Reich, on May 22, 1953 signed a stipulation approved by the Court three days later *staying all proceedings until after determination of a motion by Radio for security for costs* (R. 37-8). See Calif. Corp. Code, § 834. The security motion was never disposed of and, accordingly, Radio was never called upon to answer the California complaint.

Every step taken by Reich as against Radio after May 25, 1953, in either the Court below or here, directly violated that stipulation.

B. The First Dismissal of the Suit Below and its Vacation

After a hearing before the Court below on June 8, 1953, Judge Harrison entered an order on June 26th quashing Reich's purported service on Hughes and dismissing the complaint on the ground that an identical action was pending and then at issue in Nevada (R. 40-2).

On Reich's motion this order in so far as the dismissal was concerned was vacated on October 5, 1953 (R. 71-2; 131-3). Thereafter Judge Harrison periodically continued all matters pending a final disposition of the Nevada case (R. 118-121; 121-2; 122-3; 173-4; 181-3).

In the course of these proceedings, Judge Harrison made his knowledge as to the ability and integrity of the judge before whom the Nevada action was pending a matter of record (*e.g.,* R. 370). Reich has never explicitly questioned the accuracy of Judge Harrison's views.[1]

C. Reich's Charge of Collusion

Faced with the prospect that a decision in the Nevada action—in which he was not of counsel—would be *res judicata* in the California suit, Reich, in October of 1953, began persistently and recklessly to charge the defendants and plaintiffs' New York counsel, Kipnis, with "collusion in submitting the action to the Nevada court" (R. 95).[2]

This charge was not confined to the forum below. Reich corresponded directly with Judge McNamee of the Nevada Court inviting an investigation of the manner and means

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[1] Reich's later collusion charge must be regarded as reflecting implicitly upon the competence, if not the integrity, of the Nevada Court, since that Court was advised of the charge, considered it and expressly rejected it.

[2] Prior to this belated assertion of "collusion," Reich had made clear to Kipnis that he would be satisfied if he were included as co-counsel in the Nevada action (R. 322-3).

by which the Castleman action had come to issue before that Court (R. 99-105). He refused or failed to appear, however, when, on motion by Hughes, the Nevada Court heard the matter (R. 116-18). In fact, Reich—in all of his subsequent reiterations of the charge of collusion—never passed from the realm of insinuation and innuendo into an area of probative evidence or even legitimate inference.

The Nevada Court, in accord with the duty imposed upon it by Rule 23(c) of both the Nevada and Federal Rules, remained cognizant of the collusion charge and ultimately disposed of it in its findings (R. 223-5) prior to the entry of final judgment.

D. Hughes' Offer, Litigation Thereon and the Entry of Final Judgment in Nevada

From the date of instituting the Nevada suit, the Castleman attorneys engaged actively in preparation of that action for trial. Twenty-one witnesses—including Hughes—were examined on deposition. Voluminous files of RKO were inspected, and scores of documents were selected and marked as exhibits (R. 187).

On February 7, 1954, Hughes (R. 195 *et seq.*) offered to buy all of the assets of RKO, *including all pending stockholders' suits*, at a price equivalent to $6 per share of stock outstanding. Hughes further offered to vote his stock in favor of reducing the corporation's capital through the redemption of all stock (except his own) at that price (R. 195 *et seq.*). The net effect of this offer clearly was to cut through the various pending controversies and to extinguish all stockholder suits (R. 195; 200-1).

Litigation ensued in the Chancery Court in Delaware, the state of RKO's incorporation. The validity of the proposed sale of assets, the propriety of including therein the offer for any claims asserted in the stockholders' actions, and the fairness of the offer were upheld (see *Schiff* v. *RKO Pictures Corp.*, 104 A. 2d 267 [1954]) in a proceeding which

Reich has never questioned and which he specifically concedes to be *res judicata* (Brief, pp. 19-20). The offer was thereafter accepted by an overwhelming majority of all non-Hughes stock at a special meeting of RKO stockholders called for the purpose on March 18, 1954 (R. 188; 220).

In February, 1954, anticipating the acceptance of his offer, Hughes moved to dismiss the Nevada action with prejudice. Pursuant to direction of the Nevada Court (R. 212-3), notice of hearing of this motion in form prescribed by that Court, together with a copy of the notice of motion itself, was furnished to all RKO stockholders (R. 188-9; 200-3; 227; 236). On March 22, 1954, the return day of the motion, various stockholders—including the Castlemans and the appellant Novembers—appeared in person or by counsel before the Nevada Court and a hearing ensued (R. 189, 226).

On March 30, 1954, the Nevada Court filed extensive findings of fact and conclusions of law (R. 214-225) and entered an interlocutory order pursuant to Rule 23(c) approving the sale of RKO's assets to Hughes as a compromise and settlement of the action (R. 226-8). On April 1, 1954, after consummation of the sale of the assets (R. 192-3), the Nevada Court entered a final judgment dismissing the action with prejudice as to all defendants, retaining jurisdiction only for the determination and allocation of all costs and fees allowable to any stockholder plaintiffs in any action "wherever pending" (R. 231-2).

On April 5, 1954 after due notice to all counsel who had appeared of record in any of the derivative actions against Hughes (R. 235-37),[1] the Nevada Court awarded to the

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[1] In addition to the Castleman suits in Nevada and California, there were also pending on April 1, 1954 four other stockholder suits against Hughes in the Federal and State Courts of California and in the New York State Courts (R. 217-9). The *Schiff* action in Delaware had been decided March 26, 1954 (104 A 2d 267).

Castlemans $160,000, being $125,000 for counsel fees, $25,000 for accountant's fees and $10,000 for disbursements. This award, as specifically provided therein, was to "cover all fees for all attorneys who have appeared in any action, wherever pending, on behalf of Eli B. Castleman, et al., the plaintiffs in this action . . ." (R. 238).

E. Radio's Motion to Dismiss Below and Reich's Motions for Counsel Fees

With the Nevada case at an end, Radio moved below to dismiss the California suit on the ground that the final judgment in Nevada was *res judicata* (R. 184-6).[1]

Reich thereupon renewed all motions which had been previously continued by Judge Harrison and filed separate motions to assess his counsel fees against either the defendants or the plaintiffs, or perhaps both (R. 263; 283).

After continuing the matter for the submission of briefs (R. 351-2), Judge Harrison handed down a memorandum on August 5, 1954, granting Radio's motion to dismiss upon two grounds: (a) consummation of the sale of all causes of action to the alleged principal wrongdoer, declared valid in the Delaware Chancery Court, rendered the action moot; and (b) the Nevada judgment was *res judicata* as to all issues tendered in the California complaint (R. 356-7).

Judge Harrison denied Reich's motion for attorneys' fees on the ground that he had been employed by the Castlemans' New York counsel who, in turn, had been the recipient of an award of fees in the Nevada action (R. 357).

After a duly noticed hearing on objections (R. 357-8, 359), the final judgment from which "appellants"—that is to say, Reich—appeal was entered September 27, 1954 (R. 360-1).

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[1] Prior to the entry of judgment in Nevada, the plaintiffs amended their complaint to comprehend in all respects the additional matters which had been alleged in the amended complaint below filed by Reich on March 4, 1954. This fact was duly noted in the Nevada judgment (R. 217).

F. Proceedings Since Judgment Below

This Court has been informed that Reich is presently suing Kipnis in the state courts of New York for $64,050.37 as his claimed share of the counsel fees awarded to the Castlemans in Nevada. See the affidavit of Louis Kipnis sworn to November 18, 1954, filed in this Court in support of the motion by plaintiffs below to dismiss this appeal.

Issues

We respectfully submit that only two issues survive the welter of charge and countercharge:

1. Was the District Court correct in dismissing the action below on either of the grounds set forth in its memorandum of August 5th?

2. Did the District Court err in refusing to make an award of counsel fees to Reich against defendant-appellee RKO Radio Pictures, Inc.?

Argument

I.

The dismissal below over Reich's charges of collusion was correct.

A. Plaintiffs Below and All RKO Stockholders Are Bound By the Nevada Judgment

It is as elementary as hornbook law that the plaintiffs below—the Castlemans and Feuerman—having been also plaintiffs in the Nevada suit, are barred and estopped from attacking the Nevada judgment collaterally. By their appointed counsel they participated in all hearings and proceedings leading to that decree. They accepted its benefits; did not appeal and consequently are bound. By the

same token, Reich, erstwhile California counsel to these plaintiffs, stands in privity with them and is also barred and estopped from attacking the Nevada judgment collaterally. 49 C. J. S., Judgments, § 434-b; 1 Freeman on Judgments (5th Ed., 1925), §§ 305, 317.

Moreover the "appellant" Novembers also appeared at and were free to participate in the hearing in Nevada which resulted in that Court's Final Judgment of April 1, 1954 (R. 236). Since the Novembers did not appeal the Nevada judgment, as was their right after court approval of the compromise and settlement (see, e.g., *Masterson* v. *Pergament,* 203 F. 2d 315 [6th Cir., 1953]; *Cohen* v. *Young,* 127 F. 2d 721 [6th Cir., 1942]), they also are foreclosed from collateral attack.

Merely as an individual, Reich obviously has no standing whatsoever; not being an RKO stockholder, he is not aggrieved by either the Nevada judgment or the judment below. Reich, in the most charitable light, is a mere volunteer without even a shadow of justiciable interest in the matters involved in these stockholders' actions.

Although these facts render this appeal wholly groundless, we nevertheless—and without waiving the point—assume *arguendo* that this appeal is by members of the litigating class within the meaning of Rule 23(a)(1) who received the notices of the Nevada proceedings sent all RKO stockholders, but who failed to appear at the hearing pursuant to such notice.

Even on this assumption, it must be conceded that, upon unquestionable principles of *res judicata,* the action below was properly dismissed.

In an obvious attempt to forestall dismissal, Reich charged that the Nevada action was collusive or, at least, non-adversary. He asserted that such a charge required the California court to permit his collateral attack on the Nevada judgment even though the precise subject matter of his collusion charge had been raised in the course of the

Nevada proceedings (R. 98-114) and had been specifically determined by that Court as being without substance (R. 223-5).

Reich's contentions in this regard are unsupported by authority. The cases upon which he purports to rely all share the same vital flaw. None meets the question at bar, namely:

Where a stockholder's derivative action, after due notice to all other stockholders pursuant to Rule 23(c), has terminated in a final judgment based upon judicial examination and approval of a settlement of the controversy, can a dissatisfied stockholder avoid the normal *res judicata* operation of such judgment by a collateral attack in a foreign jurisdiction based upon a claim of collusion?

Reich's failure to find any authority for the affirmative is not surprising. It is the natural result of his failure to comprehend the rationale behind Rule 23(c)'s requirement of court approval after notice to all stockholders. This Rule not only required the Nevada Court to consider the bona fides of the action and of, its compromise, but also imposed upon each stockholder the obligation of coming forward with any claim of vitiating collusion in the Nevada Court or being forever barred from contesting that issue in any action pending elsewhere.

These principles are fully settled.

Rule 23(c) is designed to protect the corporation's interests in the proposed settlement or compromise.

> *Piccard* v. *Sperry Corp.,* 36 F. Supp. 1006 (S. D. N. Y., 1941), aff'd. 120 F. 2d 328 (2nd Cir., 1941).

The court must ascertain from all pertinent sources the actual extent of probable liability. Approving a settlement solely upon the advice of counsel for the parties without independent study is reversible error.

> *Cohen* v. *Young,* 127 F. 2d 721 (6th Cir., 1942).

A more than casual study of the legal theories involved and an analysis of the evidence in support of each side's claim is required. To accept or reject a proposed settlement or compromise without such scrutiny is an abuse of discretion.

Upson v. *Otis,* 155 F. 2d 606 (2nd Cir., 1946).

To protect the corporation and thereby all the stockholders, the court is specifically charged with the task of deciding whether any extrinsic fraud or collusion existed. Thus, in *Winkelman* v. *General Motors Corporation,* 48 F. Supp. 490 (S. D. N. Y., 1942), it was stated at p. 493:

> "The role of the Court on the compromise of a stockholder's derivative action is described by Mr. Justice Rosenman in Neuberger, etc. *v.* Barrett et al., June 25, 1952. He wrote:
>
> " 'The role of the court is to see that the compromise is fair and reasonable under the circumstances and that no collusion or fraud has been practiced in the consummation of the settlement. To do this the court must weigh the probabilities and possibilities of victory or defeat as indicated by the legal or factual situation presented. If such considerations lead to the conclusion that the settlement agreed upon by the plaintiffs in the suit is not unfair or unreasonable to the corporation (in which all the other stockholders have their interest), then the action of the plaintiffs in compromising the suit should be approved.' "

To the same effect, see:

Pergament v. *Frazer,* 93 F. Supp. 13 (E. D., Mich., 1950), aff'd. 203 F. 2d 315 (6th Cir., 1953), cert. den. 346 U. S. 832 (1953);

Pottish v. *Divak,* 71 F. Supp. 737 (S. D., N. Y., 1947).

Requiring notice to the stockholders and according them an opportunity to present objections or suggestions clearly

evidences that the court is actually deciding everybody's rights in the controversy, not just what the immediate parties envision or purport them to be. Thus, in *Cohen* v. *Young,* 127 F. 2d 721 (6th Cir., 1942), it was stated at p. 725 that:

> "The rule [i.e., Rule 23(c)] provides for notice to stockholders not only in order that they may have the right to be heard but also in order that the court may have the benefit of that broader information which comes from receiving advice as to the views of all parties concerned and from considering evidence proffered by them upon the relevant points of the case. In other words, the rule was adopted to secure not routine approval of a consent decree, but in order to insure supervision of the court for the protection of the corporation and all the stockholders."

See, also, *Pottish* v. *Divak,* 71 F. Supp. 737 (S. D., N. Y., 1947).

Conclusive authority against a stockholder raising the issue of collusion collaterally lies in the fact that Rule 23(c) accords each stockholder the following rights: he may offer evidence in support of, or in opposition to, the proposed dismissal and, without formal intervention, may appeal directly from the trial court's eventual approval or non-approval. *Cohen* v. *Young,* 127 F. 2d 721 (6th Cir., 1942); *Masterson* v. *Pergament,* 203 F. 2d 315 (6th Cir., 1953).

This is fundamental to the successful—and meaningful—operation of Rule 23(c). It is the recognition of these rights which distinguishes class actions from more conventional lawsuits or situations in which claims are voluntarily dismissed or compromised without the scrutiny of the court and the benefit of its approval as required by Rule 23(c). Non-parties who are directly affected by the result in such conventional litigation may, of course, collaterally attack the judgment.

By the same reasoning, when a class action arises in a jurisdiction which permits dismissal or compromise without

court approval after notice to all class members, those members of the class who are not before the court have no opportunity to participate in the proceedings or to appeal and their rights can be protected *only* by a collateral attack. These are the situations which Reich cites to this Court.

Rule 23(c), however, provides a practical means for direct participation by all class members and a right of appeal to any who may feel aggrieved. This accords full protection to all, obviates any need for the cumbersome weapon of collateral attack, and hence proscribes such an attack.

Here the Nevada Court, in considering the evidence and in finding that the action and proceedings before it were adversary and non-collusive, conscientiously fulfilled the duty imposed upon it by Rule 23(c). Reich, on the other hand, after defaulting in the presentation of his evidence, if any he had, in Nevada and failing to appeal from the Nevada judgment, can not raise the collusion issue collaterally.

The recent litigation in the Sixth and Second Circuits affecting the Kaiser-Frazer Corporation is completely dispositive of Reich's contention here.

See

Pergament v. *Frazer, et al.*, 93 F. Supp. 13 (E. D., Mich., 1950), aff'd. 203 F. 2d 315 (6th Cir., 1953), cert. den. 346 U. S. 832 (1953); and

Stella v. *Kaiser, et al.*, 218 F. 2d 64 (2nd Cir., 1954).

In the *Kaiser-Frazer* situation six stockholders' actions were pending in various courts in different states—three in Federal and three in State courts. Defendants chose to negotiate a settlement with the attorneys representing Pergament in the Eastern District of Michigan. Attorneys for the plaintiffs in the other actions did not participate in the talks. Eventually, and without consulting counsel for

the other plaintiffs, a settlement of the entire controversy was reached. The settlement was then placed before the Court for its approval.

All stockholder plaintiffs were duly notified of the motion for dismissal based upon the settlement and were invited to appear by their counsel before the Michigan Federal Court. Among the charges made was that Pergament and the defendants were in collusion. On this point the District Court ruled:

> " . . . We saw no evidence of any such collusion. In all cases after attorneys have arrived at an agreement and it is desired to protect the several parties, it is usual for them to collaborate and make certain that nothing has been overlooked. Plaintiffs' attorneys said that they thought they had driven a good bargain, utilizing to the extreme the knowledge that defendants, particularly the Kaisers, wanted all these lawsuits out of the way before going on the guaranties of the hoped for loan from RFC. It is no great wonder, and we don't believe subject to the charge of collusion, that when the several attorneys had arrived at this point it was insisted by defendants that amendments be made to plaintiffs' bill of complaint to include the other actions. Defendants would have settled on no other basis. They wanted —and rightly so—to put an end to what they then termed, these bickerings, snipings, and nuisance lawsuits that were interfering with the progress and success of the Kaiser-Frazer Corporation. And why shouldn't they?" (93 F. Supp. at p. 20.)

After extended hearings and close analysis, the Court approved the settlement as proposed and dismissed the action with prejudice. In describing the effect of this judgment it stated, at p. 17:

> "On or about September 21, or 25, 1949, Pergament and London, plaintiffs in this action, began conferences with defendants through their attorneys, having as their objective settlement of this and all derivative suits begun by stockholders. A settlement agreement was arrived at October 25, 1949.

> "That proposed compromise is now before this court and if approved will serve to dismiss not only the Pergament-London action but will eliminate all other stockholders' derivative suits heretofore started."

On appeal the District Court's approval was affirmed by a divided court. *Masterson* v. *Pergament,* 203 F. 2d 315 (6th Cir., 1953). The Supreme Court declined review by certiorari. *Masterson* v. *Pergament,* 346 U. S. 832.

The matter, however, was not permitted to rest at that point. Another stockholder, Stella, sought to renew and press an action which he had instituted in the Southern District of New York (see 82 F. Supp. 301) *prior* to the institution of the Pergament action in Michigan. The precise parallel of this sequence to the much-labored fact that the Castleman-California action preceded the Castleman-Nevada action by eight days will be obvious to this Court. Stella was met with the claim that the Pergament settlement and judgment of dismissal were *res judicata* to which he replied, *inter alia,* that the Michigan judgment was so fatally tinged with fraud as to permit a collateral attack to be maintained in New York.

In reviewing the entry of summary judgment for the defendants, the Second Circuit ruled unanimously that the judgment was beyond attack on this ground. Chief Judge Clark's opinion in *Stella* v. *Kaiser,* 218 F. 2d 64 (handed down December 7, 1954), reads in part as follows:

> ". . . Plaintiff was an active litigant in the proceedings . . . [in Michigan] and is bound under the principles of res judicata at least with respect to those defendants who were parties of record in Michigan. Baldwin v. Iowa State Traveling Men's Ass'n, 283 U. S. 522, 51 S. Ct. 517, 75 L. Ed. 1244. Even without his active participation Stella would have been bound by the Michigan court's action, since it was a conclusive adjudication of a 'true' class action, Hansberry v. Lee, 311 U. S. 32, 61 S. Ct. 115, 85 L. Ed. 22, 132 A. L. R. 741; 3 Moore's Federal Practice

23.11 (2d Ed. 1948); McLaughlin, Capacity of Plaintiff-Stockholder to Terminate a Stockholder's Suit, 46 Yale L. J. 421, 424, and since, moreover, there was adequacy of notice and representation as found by the Sixth Circuit, Masterson v. Pergament, supra, 6 Cir., 203 F. 2d 315, 330. See Dickinson v. Burnham, 2 Cir., 197 F. 2d 973, certiorari denied 344 U. S. 875, . . .

"Plaintiff asserts, however, that the settlement itself was procured by fraud and that the Michigan decree is subject to attack for failure to decide this issue. But in this he is in error, for the fraud issue was in fact disposed of adversely to him by the Court of Appeals. Masterson v. Pergament, supra, 6 Cir., 203 F. 2d 315, 330-331. Since this issue was repeatedly raised, it cannot now be made the basis for collateral attack. De Bobula v. Goss, 90 U. S. App. D. C. 28, 193 F. 2d 35.

* * *

". . . the only issue, as I see it, is whether a judicially effected compromise should have the same binding effect as a voluntary one would have. The writer of this opinion can see no reason why it should not. The judicial scrutiny contemplated by F. R. C. P. 23(c) gives to the parties a greater degree of protection than do many private settlements. The salutary effect of the rule would be seriously impaired if dissatisfied parties could revive compromised claims against parties whom the settlement expressly covered. The Third Circuit recently held that, even without judicial safeguards, a prior consent judgment may be successfully invoked by any defendants whose relationship to earlier defendants was 'close enough.' Lawlor v. National Screen Service Corp., 3 Cir., 211 F. 2d 934, certiorari granted 75 S. Ct. 42. Here we need not go so far, but may hold simply that a member of the class of stockholders in a derivative action is bound by and must accept a judicially approved compromise in his behalf. This is the traditional class suit or representative situation, see Advisory Committee's Note to F. R. C. P. 23(a) (1); 3 Moore's Federal Practice 3436, 3437, 3459, 3460 (2d Ed. 1948). Since Stella would thus be bound even by a totally adverse

> judgment, there seems no reason why he—so represented—should not be bound by the release and satisfaction ordered by the court." (pp. 65-67)

The case is precisely analogous. Reich has no standing to assert—on behalf of any RKO stockholder, whether actually present before Judge McNamee on March 22, 1954 or not—that a collateral attack can be levied in the California courts now against the Nevada Court's judgment of dismissal with prejudice entered after notice to all RKO stockholders.

B. The Notice to RKO Stockholders of the Motion to Dismiss Was Adequate

No doubt because of an appreciation of the inherent difficulty of his position, Reich also challenges the adequacy of the notice concededly given all RKO stockholders of Hughes' motion to dismiss.

The formal notice was, however, the product of an intermediate order of the Nevada Court which approved both its form and its method of transmittal (R. 188-9). This notice (printed in full at R. 202-3), together with a copy of the Motion to Dismiss as filed on February 11, 1954 (printed in full at R. 200-1), was mailed on or about March 1, 1954 to each record stockholder with the proxy statement for the special meeting of stockholders called for March 18, 1954 to consider Hughes' offer (R. 189, 215). The offer to purchase all RKO assets "including any and all claims or causes of action of every kind or character against defendant which might be asserted against any person or persons, including me" (R. 195 *et seq.*) was, of course, also furnished all stockholders with the proxy statement which, in turn, set forth the nature and status of all pending suits.

Rule 23(c) imposes upon the court the duty of prescribing the form of the requisite notice to be given all

members of a class of the pendency of a "proposed dismissal *or* compromise." In this case, a proposed dismissal was in the offing if RKO's stockholders should approve a sale to Hughes of the corporation's assets, including any claims against him, with the consequent prospect that those claims would be extinguished in such a sale.

The Supreme Court has held in an analogous situation that, to afford the requisite due process, the notice given must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . The notice must be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance . . . But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied." See *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314-315 (1950), and cases therein cited.

It is submitted that both the form and method of giving notice to RKO's stockholders satisfy this test.

Reich's difficulty seems to lie in his apparent failure to accept the effect, in secondary class actions, of extinguishing all claims against Hughes. This effect is not defined or measured by factual evidence. It flows from the rule of law that extinguishing a claim results in compromising the claim. By accepting the offer of Hughes, the corporation assigned, among other property rights, any claims against him which it might have, including any asserted in the several stockholder actions. After this assignment, the plaintiffs in the Nevada suit, the Castlemans, and all others in their class—*i.e.*, all other stockholders—would have no further interest in any action against Hughes.

That an extinguishment of all of RKO's claims against Hughes (a prospect of which the stockholders were ex-

pressly advised) is a compromise, as a matter of law, is shown by an examination of the pertinent cases. See, *e.g.*,

Stella v. *Kaiser, supra,* 218 F. 2d 64 (2nd Cir., 1954);

May v. *Midwest Refining Co.,* 121 F. 2d 431, 440 (1st Cir., 1941);

Piccard v. *Sperry Corporation,* 36 F. Supp. 1006, aff'd. 120 F. 2d 328 (2nd Cir., 1941);

Malcolm v. *Cities Service Co.,* 2 F. R. D. 405 (D. Del., 1942).

By sale of the causes of action, "the case has in fact been compromised and is ripe for dismissal," bringing Rule 23(c) into play whether or not a formal motion to dismiss has been filed. Cf. *Webster Eisenlohr, Inc.* v. *Kalodner,* 145 F. 2d 316 (3rd Cir., 1944), dissent by Judge Biggs at p. 325.

Here, all RKO stockholders were on notice that they could "take any action with respect [to the proposed dismissal] before this court which may be proper" (R. 203). Reich therefore cannot seriously contend that the stockholders were without notice that they could introduce evidence bearing on the fairness of the purchase which resulted in the extinguishment of the claims and causes asserted in their derivative actions. The Nevada Court was required to pass upon the fairness of this purchase. Refusal to receive a stockholder's proffered evidence on the issue of fairness would have constituted reversible error.

The position of the Court under Rule 23(c) was stated in *Cohen* v. *Young, supra,* as follows:

> " . . . Under the circumstances here presented, Rule 23(c) does not justify approval of a proposed compromise of a class action solely upon the recommendation of attorneys even though they represent all parties of record. The rule provides for notice to stockholders not only in order that they may have the right to be heard but also in order that the court

> may have the benefit of that broader information which comes from receiving advice as to the views of all parties concerned and from considering evidence proffered by them upon the relevant points of the case. In other words, the rule was adopted to secure not routine approval of a consent decree, but in order to insure supervision of the court for the protection of the corporation and all the stockholders" (127 F. 2d at 725).

The above demonstrates fully the complete adequacy of the notice given RKO stockholders under direction of the Nevada Court. Compliance with Rule 23(c) having been fulfilled, due process was accorded all parties having an interest in the extinction of any claim against Hughes.

C. In Any Event, Any Question of the Fairness of the Compromise Effected by the Sale to Hughes Is Now Foreclosed

Ultimately Reich must answer the question as to what he proposes to litigate in the event of a reversal here. To date he has scrupulously avoided any charge that the challenge to the Hughes offer litigated in the Delaware Chancery Court is subject to a collateral attack in California. In that proceeding to enjoin the sale of RKO's assets to Hughes, the Chancellor, after careful review of the extensive evidence, ruled that the plaintiffs had failed to sustain their burden of showing fraud or bad faith and granted judgment on the merits in favor of the defendants. *Schiff* v. *RKO Pictures Corp.,* 104 A. 2d 267, 280 (1954).

Passing the point that it was also specifically charged in Delaware that fraud and bad faith were inherent in the plan to purchase the claims asserted in the pending stockholder suits with all other assets (see 104 A. 2d at p. 280), it remains that no appeal was taken in that action. Furthermore, Reich specifically concedes that "the Delaware action is *res judicata* on the issue as to whether the sale was fair and that the appellants here do not and cannot challenge that judgment" (Opening Brief, pp. 19-20).

Finally, it may be noted that the Motion to Dismiss the Nevada action, as supplied to all stockholders, clearly put everyone on notice that if Hughes' offer was accepted, the sale "will effectively extinguish all claims and causes of action against this defendant *and* will render this pending action moot as to this defendant" (R. 200-1). One ground of Judge Harrison's memorandum decision of August 5, 1954, granting the motion to dismiss below was that the effect of the sale of all RKO assets—including the cause of action then before him—was to render the action moot (R. 356).

Following the judgments in Delaware and in Nevada, all assets of RKO were transferred to Hughes, in exchange for $23,489,478 in cash. For over thirteen months, at the date of this brief, Radio, the only corporation before this Court, has been wholly owned by Hughes. Does Reich propose a reversal so that he may prosecute on behalf of Radio a claim against its sole owner, who would be the sole beneficiary of any recovery (after deduction of fees for Reich)?

II.

No further counsel fees can be assessed against Radio.

It is this phase of the appeal which appears to explain most, if not all, the tumult. Reich has been relegated by the Court below to his employers, Kipnis and Mittelman, for any fee which can justly be regarded as due him. We leave it to the co-appellees to argue the merits of whether any fee is allowable against them in this action or should be determined in the action instituted by Reich in New York. We are concerned only with the claim for a second award of fees against Radio.

When Reich moved below for an award of counsel fees and costs against "defendants other than Bank" (R. 283 et seq.) it was then true, as it had been from the beginning,

that personal jurisdiction had been obtained in the action only over the present appellee Radio, a former subsidiary of RKO.

Under general equitable principles, of course, plaintiff's counsel fee in a derivative action is to be measured by—and charged to—the benefits flowing to the corporation on whose behalf the suit is undertaken. See 13 Fletcher, Cyclopedia Corporations (Rev. Ed.) § 6045 and cases therein cited.

Even if we assume that Reich's activity produced some benefit to RKO, the former parent, and reject the idea that his maneuvers amounted to no more than a plaguing and expensive nuisance to all concerned, plaintiffs and defendants alike, it is difficult to perceive the logic in (a) awarding anything but nominal fees for the prosecution of an action against Radio, a subsidiary of an interested but basically neutral party, in the absence of the alleged wrongdoer and (b) awarding anything at all against a party who in nowise could be benefited by the most generous recovery.

Be that as it may, Reich cannot be awarded any fees against "the RKO defendants" for the following reasons:

A. Reich, as self-styled counsel for the Castleman plaintiffs, is barred from any recovery of fees by reason of the fact that the Castlemans were reimbursed by the Nevada Court for all expenses for attorneys.

The plaintiffs below, the Castlemans, were awarded a judgment on April 5, 1954 for all expenses incurred by them to cover the fees of all counsel who had appeared for them in any of their actions, wherever pending (R. 233 *et seq.*). The award included $125,000 for attorneys' fees, plus $8,000 disbursements, plus $27,000 for accountants' fees and disbursements (R. 238). The judgment has been paid.

The Nevada Court was fully advised with respect to the date of institution and the pendency of the California action covering the same causes of action pleaded in Nevada (R. 217-8).

Reich was duly notified that the Nevada Court would determine the amounts, if any, to be allowed to the Castlemans for their expenses for attorneys. He received this notice in two ways:

First, Reich received the formal notice of the motion by Radio and RKO in the Nevada action for a hearing to determine the allowance of costs, disbursements and attorneys' fees (R. 209-211), and the order of Court setting such a hearing for April 5, 1954 (R. 212-4). Receipt of this notice is conceded (R. 260).

Secondly, Reich also received a letter from Kipnis, dated March 8, 1954, advising that the Castlemans were moving for an award of counsel fees but would not include a claim for Reich. Kipnis suggested that if he believed that his "alleged services are compensable," he so assert before Judge McNamee (R. 260-2).

The claim, if any, of the Castlemans for reimbursements of their expense for attorneys representing them obviously could not be split by letters passing between their various present or past counsel. This was clearly recognized by the Nevada Court which, on the motion of Radio and RKO and the cross motion of the Castlemans, awarded a sum to the Castlemans "for all expenses for attorneys and accountants and other disbursements incident to the prosecution of this and all other actions in which Eli B. Castleman, et al., or any of them, are plaintiffs as stockholders of RKO Pictures Corp." (R. 241), and further ordered that RKO and Radio "be, and they hereby are, released and discharged from any and all claims by any plaintiff . . . (other than the plaintiffs herein . . .) . . . in any action purported to be brought on [their] behalf, whereever instituted or pending, for attorneys' fees . . ." (R. 241-2).

Since the Nevada Court granted counsel fees to the Castlemans after due notice to all concerned, that award is binding upon them in this Court as it is upon Reich to

the extent that he claims by or through them as their attorney. See Point I A and B, *supra.*

There was nothing novel in the Nevada Court's action. Given the requisite notice to all counsel of record in all pending suits, a single court may make—and often has made—a single award to cover all related actions.

See, *e.g.,*

Waterman Corp. v. *Johnston,* 122 N. Y. S. 2d 695 (Sup. Ct., N. Y., 1953), fees allowed in New York action covering services in actions in Delaware and Washington, D. C.;

Perrine v. *Pennroad Corp.,* 51 A. 2d 327 (Chan. Del., 1947) aff'd 64 A. 2d 412 (Del., 1948), Delaware court approving settlement awarded fees also for services in action in Pennsylvania federal court;

Diamond v. *Davis,* 62 N. Y. S. 2d 175 (Sup. Ct., N. Y., 1945), award in New York state court for services in federal court action which had been stayed pending outcome of action; and

Winkleman v. *General Motors,* 48 F. Supp. 504 (S. D. N. Y., 1942), award to attorney whose other actions, one in different court, were stayed pending outcome of principal action.

B. Nor may Reich base any claims for fees upon his representation of the Novembers in their application to intervene below. The motion (R. 175-181) was dated March 5, 1954, almost one month after February 7, 1954, the date of the Hughes offer to purchase the assets of RKO.

It is manifest from these dates that the intervention motion could not have had any bearing on the Hughes offer.

At the hearing before Judge McNamee on March 22, 1954, the Novembers appeared by their Nevada counsel (R. 189). Even Reich concedes on hearsay that Tom Foley, the Novembers' Nevada counsel, "was present as an observer in the courtroom" and also that Foley "was in-

vited to cross-examine'' (R. 258-9). Judge McNamee's Final Order of April 5, 1954 specifically finds:

> ''That on March 22, 1954, at the hearing on the Motion to Dismiss this action with prejudice, certain stockholders appeared in person or by counsel and participated, or were accorded full opportunity to participate, in this proceeding; that among such stockholders so appearing were . . . Julius November and Eleanor November, appearing by Foley & Foley, attorneys of Las Vegas, Nevada'' (R. 236).

Reich was not openly active as counsel for the Novembers until March, 1954, long after the Hughes offer had been made as finally approved and accepted, and manifestly his activities in this capacity conferred no benefit on RKO, much less on Radio.

Counsel for a proposed intervenor is but a volunteer and has no right to fees from the corporate defendant.

> *Mann* v. *Superior Court of Los Angeles County,* 53 Cal. App. 2d 272, 127 Pac. 2d 970, 975 (1942).

See, also:

> *Perrine* v. *Pennroad Corp.,* 51 A. 2d 327, 336 (Del., Chan. Ct., 1947), aff'd 64 A. 2d 412 (Del., 1948);
>
> *Ex parte Gray,* 47 S. 286 (Ala., 1908);
>
> Hornstein, *Counsel Fees in Stockholders' Derivative Actions,* 39 Col. L. R. 784, 803 (1939).

III.

No other acts or omissions of the Court below are presently reviewable.

In his Opening Brief, Reich labors a variety of intermediate and interlocutory dispositions of the many motions and applications made to Judge Harrison at various times. Under the salutary rule that such actions and omissions

of a lower court will not warrant a reversal in the absence of a clear showing of prejudice or an abuse of discretion, this Court should decline to entertain or review the matters embraced in Points IV, V, VI and VII of Appellants' Opening Brief.

CONCLUSION

For the foregoing reasons the final judgment of the District Court, entered on September 27, 1954, must be, in all respects, affirmed, with costs.

Respectfully submitted,

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